No. 93-1380

Supreme Court, U.S.
FILED
APR 5 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

A.J. ARAVE, WARDEN,

Petitioner,

v.

ALBERT RAY BEAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. Whether the Court of Appeals failed to afford the presumption of correctness to the state court findings of fact consistent with the procedures established under 28 U.S.C. § 2254(d), as construed in *Sumner v. Mata*, 449 U.S. 539 (1981), and its progeny?

II. Whether the Court of Appeals – contrary to the principles of the *Teague* doctrine – expanded the circumstances when a rule may be retroactively applied or announced on collateral review, including: (a) when the rule is characterized as substantive law and not a criminal procedure rule; or (b) when the application of an old rule yields a novel result.

III. Whether the novel application of *Herndon v. Lowry*, 301 U.S. 242, 258 (1937), in the Eighth Amendment context in this case, satisfies the first exception to the *Teague* doctrine and may therefore be applied and announced retroactively on collateral review?

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BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

Amici States have a substantial interest in protecting presumptively valid and final state court convictions and sentences from collateral attack on the basis of facts which are determined *de novo* in federal court and new rules which were unavailable at the conclusion of the direct review process.

In *Sumner v. Mata*, 449 U.S. 539 (1981) (*"Mata I"*), and other cases, this Court has repeatedly stressed that state court findings of fact are entitled to the statutory presumption of correctness, absent narrow circumstances. *See* 28 U.S.C. § 2254(d). This statutory requirement limits the role of federal habeas courts in reviewing factual issues which were properly entered by the state court. *See Mata I*, 449 U.S. at 547 n.2. *Amici* have an interest in the integrity of their state court processes and due deference being afforded to state court findings of fact on federal habeas review.

In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and its progeny, this Court also recognized the limited role of federal habeas review by establishing a general principle barring the retroactive application of new rules on collateral review. This holding reflects the criminal justice interests in finality, predictability, and comity and the validation of reasonable, good-faith state court determinations. Important questions are also raised concerning the availability and application of the *Teague* doctrine in this case.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

In 1983, Albert Ray Beam was convicted for his involvement with another individual in the rape and murder of a 13 year old. He was sentenced to death for first-degree murder and received a 30-year sentence for

the rape. *See State v. Beam*, 109 Idaho 616, 710 P.2d 526, 528 (1985), *cert. denied*, 476 U.S. 1153 (1986).

After the U.S. District Court for the District of Idaho denied Beam's petition for writ of habeas corpus, *Beam v. Paskett*, 744 F. Supp. 958 (D. Idaho 1990), the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction but vacated the death sentence based upon an earlier Ninth Circuit opinion. *See Beam v. Paskett*, 966 F.2d 1563, 1567, 1571 (9th Cir. 1992) (citing *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), *rev'd in part and remanded*, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993)). This Court vacated the Ninth Circuit judgment in *Beam* and remanded the case for further reconsideration after this Court reversed the earlier Ninth Circuit decision. *See Arave v. Beam*, 113 S.Ct. 1837, 123 L.Ed.2d 464 (1993). On remand, the Ninth Circuit once again vacated the death sentence after concluding the application of the aggravating factor under Idaho law that the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society" violated the Eighth Amendment. *Beam v. Paskett*, 3 F.3d 1301, 1312 (9th Cir. 1993). Idaho now petitions for certiorari.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals bypassed two principles which were intended to limit the role of federal habeas courts reviewing state court judgments.

First, the Federal Habeas Corpus statute, as construed by this Court, requires federal courts to presume the correctness of state court findings of fact, unless enumerated exceptions are satisfied. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981) (*Mata I*). The Court of Appeals was the first court reviewing this case to question the validity of the state court findings of fact. The record in this case shows that the Court of Appeals recast the state court's findings of fact in its own terms and disregarded the state court's findings of fact. *See* notes 6-8, *infra*. Moreover, if the Court of Appeals was

going to depart from the state court findings, it failed to comply with settled procedures, including (1) identifying which enumerated statutory exception permitted this departure; (2) alternatively, requiring the petitioner "to establish by convincing evidence that the factual determination by the State court was erroneous"; and (3) providing a statement of its reasoning why the presumption of correctness should not apply. *See* 28 U.S.C. § 2254(d); *Mata I*, 449 U.S. at 549, 551-52. Unless this Court grants certiorari review, the State has no other avenue to challenge the mistreatment of the state court findings of fact in the Court of Appeals opinion.

Second, the Court of Appeals established a new rule on collateral review: "When a state asserts a penological interest (here, future dangerousness) in conduct which it cannot punish directly, we must scrutinize its actions to ensure that they have an 'appropriate relation to the safety of the state.' " *Beam*, 3 F.3d at 1309 (quoting *Herndon v. Lowry*, 301 U.S. 242, 258 (1937)). The court provided three independent reasons why its new holding was not barred by the *Teague* doctrine and could be retroactively announced and applied on collateral review: (1) the rule was characterized as substantive law and not a criminal procedural rule; (2) the rule was an old one which was merely being applied to a different set of facts; and (3) assuming *arguendo* a new rule was announced, it satisfied the first *Teague* exception. Unless certiorari review is granted, each of these three grounds noted in this lower court precedent may be subsequently utilized to permit the retroactive application of new rules on collateral review, allowing new exceptions to swallow the general principle established by *Teague*.

* * *

REASONS THE WRIT SHOULD ISSUE

I. The Court of Appeals Recast the State Court's Findings of Fact in its Own Terms and Failed to Provide the Presumption of Correctness to the State Court Findings of Fact, As Required Under 28 U.S.C. § 2254(d) and *Sumner v. Mata*, 449 U.S. 539 (1981), and Its Progeny

A. Introduction: The Statutory Presumption of Correctness

Federal courts are statutorily required to defer to state court findings of fact unless narrow exceptions are met. Specifically, since 1966, Congress has mandated that:

> a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, . . . *shall be presumed to be correct.*[1]

This presumption of correctness always applies *unless* an enumerated statutory exception is established (*e.g.*, the material facts were not adequately developed in state court).[2] In the absence of such an exception, Congress has further specified that the petitioner holds the burden "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d); *see also Mata I*, 449 U.S. at 550, 551. Before a

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[1] *See* 28 U.S.C. § 2254(d) (emphasis added) (reproduced in Appendix); *see generally Sumner v. Mata*, 449 U.S. 539, 547 n.2, 550-51 (1981) ("*Mata I*") (discussing 1966 amendment).

[2] *See* 28 U.S.C. § 2254(d) (listing exceptions); *Mata I*, 449 U.S. at 550; *see also Burden v. Zant*, 498 U.S. 433, 437 (1991) (per curiam); *Wainwright v. Witt*, 469 U.S. 412, 427-28 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) ("This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations."); *Sumner v. Mata*, 455 U.S. 591, 592, 597-98 (1982) (per curiam) ("*Mata II*").

federal court grants a petition for writ of habeas corpus under section 2254(d), it must provide a statement explaining why the presumption of correctness should not apply. *See Mata I*, 449 U.S. at 549, 551-52; *see also Burden*, 498 U.S. at 437; *Mata II*, 455 U.S. at 593.

The statutory presumption of correctness advances four important, related objectives in our state-federal criminal justice system. *First*, this requirement furthers the federalism interest inherent in habeas corpus proceedings by limiting the role of federal habeas courts on factual issues and giving deference to state court factual determinations where warranted.[3] *Second*, and concomitantly, the presumption of correctness helps respect the integrity of these state processes.[4] *Third*, the statutory presumption of correctness serves judicial economy, reducing the chance of any judicial error by assigning certain decisions to the court which is in the best position to resolve them.[5] In this manner, the requirement helps to

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[3] *See, e.g., Mata I*, 449 U.S. at 547 (discussing federalism interest); *id.* at 547 n.2 (noting "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction"); *see also Witt*, 469 U.S. at 428 n.10; *Mata I*, 449 U.S. at 550.

[4] *See, e.g., Witt*, 469 U.S. at 428 n.10 (noting presumption of correctness "preserve[s] a trial court's integrity as a court of law, instead of as an 'entrance gate' for fact collecting subject to appellate review") (quoting *O'Bryan v. Estelle*, 714 F.2d 365, 392 (5th Cir. 1983) (Higginbotham, J., concurring specially), *cert. denied*, 465 U.S. 1013 (1984)); *see also Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

[5] For example, many findings of fact fall within the peculiar province of the state trial court, such as the credibility of witnesses. *See Witt*, 469 U.S. at 428; *Patton*, 467 U.S. at 1038 & n.14; *Rushen v. Spain*, 464 U.S. 114, 121 n.6 (1983) (per curiam); *Marshall*, 459 U.S. at 434; *see also Lewis v. Jeffers*, 497 U.S. 764, 782 (1990) (discussing factual nature of state court findings of aggravating circumstances); *Cuyler v. Sullivan*, 446 U.S. 335, 342

avoid the potential problem of "stale" evidence, where years later on federal habeas review critical evidence is no longer available. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 492 (1991). *Finally*, the presumption of correctness advances the criminal justice interest in finality. *See Mata I*, 449 U.S. at 550 n.3; *see also Witt*, 469 U.S. at 428 n.10.

B. The Court of Appeals Adopted its Own Findings of Fact and Disregarded the State Court Findings

Critical to the Court of Appeals opinion was its treatment of the ninth and tenth death penalty findings of fact of the state trial court. In the ninth finding of fact, the state trial court found that Beam's "prognosis for any substantive rehabilitation is non-existent." *See* note 7, *infra* (reproducing ninth finding of fact). According to the Court of Appeals, the ninth finding of fact "was based in substantial part on the fact that '[t]he defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant.' " *Beam*, 3 F.3d at 1308 (quoting *State v. Beam*, 115 Idaho 208, 766 P.2d 678, 700 (1988), *cert. denied*, 489 U.S. 1073 (1989)). The state trial court's tenth finding of fact found Beam satisfied the "continuing threat to society" aggravating factor. *See* note 8, *infra* (reproducing tenth finding of fact).

Without any basis in the record, the Court of Appeals concluded that the ninth and tenth findings of fact were "inextricably linked" and there was "no way to separate the two findings." *Beam*, 3 F.3d at 1307 & 1308. This critical premise framed the inquiry for the court: "Therefore, unless that sexual history constitutes an appropriate

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(1980) (noting findings of fact under § 2254(d) "refers to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators") (citations and internal quotation marks omitted).

basis for a finding that underlies the imposition of the death penalty, the 'continuing threat' factor cannot stand." *Id.* at 1308.[6]

In fact, the record shows that the state trial court based the ninth finding of fact on three identified factors, only one of which concerned respondent's sexual history.[7] It is therefore unclear how the Court of Appeals

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[6] The Court of Appeals then essentially recast the state court findings of fact in its own terms:

> The [state trial] court's finding amounted to a determination that Beam's prior sexual history, consisting exclusively of non-violent, consensual or involuntary conduct, provides a valid penological basis for separating him from other capital defendants and placing him in the small group for which death is appropriate. The [state] court found, in effect, that an individual who has been the victim of incest, has engaged in homosexuality, and has had 'abnormal sexual relationships with women both older and younger' may be singled out for execution on the theory that he is a greater risk to society than most other first degree murderers.

Beam, 3 F.3d at 1308 (citations omitted).

[7] The ninth state court finding provided in its entirety:

> The prognosis for any substantive rehabilitation is non-existent. [¶] [1] The psychological evaluation describes the defendant as a person who lacks an adequate conscience, who is impulsive, and who uses others to satisfy his own personal needs. [¶] [2] Defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant. [¶] [3] The report describes the defendant as one inclined to use poor judgment and who at times acts out his basic hostility by being abusive to both people and animals. (See reports attached.)

Beam, 766 P.2d at 700.

could have concluded the ninth finding of fact "was based in *substantial part* on" the respondent's prior sexual history. *Beam*, 3 F.3d at 1308 (emphasis added).

There is also no support in the record that the tenth finding of fact was in any manner premised on Beam's sexual history. The tenth finding of fact was predicated on seven identified factors, none of which included respondent's sexual history noted in the ninth finding.[8] According to the state court, "All [of these seven enumerated factors] suggest that the defendant is possessed with a great deal of pent-up anger and frustration and that, with defendant's personality, they provide the catalyst for the propensity to commit a similar crime." *Beam*, 766 P.2d at 700. It is therefore inconceivable how the Court of

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[8] The tenth state court finding of fact provided in its entirety:

> In support of the Court's finding that the defendant has a propensity to commit murder, which will probably constitute a continuing threat to society, all one has to consider is [1] the ease with which the defendant committed this crime; [2] his total lack of remorse; [3] his abuse of people and animals; [4] the psychological evaluation which finds that there is a lack of adequate conscience development and that he is unable to feel with and/or for another person; [5] Sandra Whalen's (defendant's girlfriend) statements that defendant would often get extremely angry and report that he was going to kill the individual with whom he was angry; [6] Ricky Chilton's testimony that Beam said he was going to cut his guts out; [7] the fact that he was found with a razor blade attached to a toothbrush in jail, which a jailer testified was typically used for a dangerous weapon. All suggest that the defendant is possessed with a great deal of pent-up anger and frustration and that, with defendant's personality, they provide the catalyst for the propensity to commit a similar crime.

Beam, 766 P.2d at 700.

Appeals could have concluded from the record that the ninth and tenth findings of fact of the state court were "inextricably linked" and there was "no way to separate the two findings." *Beam*, 3 F.3d at 1307 & 1308.[9]

As the record shows, the statutory command of section 2254(d) was disregarded by the Court of Appeals in several ways. *First*, the Court of Appeals failed to afford due deference to the state trial court finding of aggravating circumstances, which was entitled to the presumption of correctness.[10] On several occasions this Court has emphasized that a federal appeals court should not substitute its own findings which would be contrary to those of a state court reviewing the same record, unless a narrow, statutory exception applies.[11] Moreover, as this

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[9] In fact, the record shows that, at least to some extent, the sexual history of the respondent was considered by the state court as mitigating evidence, along with five other mitigating evidence factors. The second state court finding in possible mitigation provided: "Defendant was raised in a turbulent family setting that included alcohol and drug abuse, sexual deviancy, and educational deprivation." *Beam*, 766 P.2d at 698; *see id.* (listing other mitigating evidence factors).

[10] *See, e.g., Lewis*, 497 U.S. at 780-81 ("Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably – perhaps even quite plainly – fit within the statutory language.") (citation and internal quotation marks omitted); *see also id.* at 782 (noting factual nature of state court findings of aggravating circumstances).

[11] *See Kuhlmann v. Wilson*, 477 U.S. 436, 460-61 (1986) (The federal appellate court "conclusion conflicts with the decision of every other state and federal judge who reviewed this record, and is clear error in light of the provisions and intent of § 2254(d)."); *Mata II*, 455 U.S. at 595 n.5 (same); *Mata I*, 449 U.S. at 548-49 (same); *see also Witt*, 469 U.S. at 434 (noting "the

court has held, even where the record is ambiguous – which it is not in the matter at bar – the federal habeas court must give deference to state court findings of fact which are fairly supported in the record. *See Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (per curiam) (construing future dangerousness finding under § 2254(d)(8)). *Second*, in departing from the state court findings of fact, the Court of Appeals failed to identify whether any of the statutory grounds for rebutting the presumption of correctness were established. *Third*, since no enumerated statutory exception was found to apply, the petitioner also was not required to satisfy his statutory burden "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d); *see also Mata I*, 449 U.S. at 550, 551. *Finally*, the Court of Appeals failed to provide a required statement of its reasoning why the presumption of correctness should not apply to the state court findings of fact. *See, e.g., Mata I*, 449 U.S. at 549, 551-52. By failing to afford the presumption of correctness to the state court findings of fact consistent with the procedures established under 28 U.S.C. § 2254(d), and this Court's decisions, the Court of Appeals also frustrated each of the objectives advanced by the presumption of correctness. *See* notes 3 to 5, *supra*, and accompanying text.

The Court of Appeals was the first court reviewing this case to question the validity of the state court findings of fact.[12] Significantly, the State has no recourse,

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question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record"); *Marshall*, 459 U.S. at 434.

[12] In contrast, in the district court, there was no occasion to reconsider the state court findings of fact or otherwise presume the findings should not be correct. *See Beam*, 744 F. Supp. at 964. The district court only rejected petitioner's legal argument that the propensity to commit murder aggravating factor was constitutionally vague.

other than to this Court, to challenge the mistreatment of the state court findings of fact in the Court of Appeals opinion. Certiorari review is warranted once again to remind lower federal courts of their statutory obligation to presume the correctness of state court findings of fact, unless one of the enumerated exceptions applies, and to follow settled procedures in departing from the statutory presumption of correctness.

II. The Court of Appeals Also Misapplied the *Teague* Doctrine and Established New Independent Grounds to Undercut this Important Doctrine of Finality, Predictability, and Comity

A. Introduction: The Vital Role of the *Teague* Doctrine in our Criminal Justice System

The *Teague* doctrine advances the federalism and criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system. *See, e.g., Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 377 (1992). Under the *Teague* doctrine, on collateral review, a petitioner may not obtain the retroactive application or announcement of "new rules" (*i.e.*, rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States), *Teague v. Lane, supra*, 489 U.S. at 301 (plurality opinion), unless the rule falls within one of two narrow exceptions.[13]

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[13] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Caspari v. Bohlen*, 62 U.S.L.W. 4113, 4115, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) (noting steps for applying the *Teague* doctrine); *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376; *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990); *Butler v. McKellar*, 494 U.S. 407, 412 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989). Even the exceptions to the *Teague* doctrine have been established with a view toward the limited scope of collateral review

Whenever a new rule is applied or announced retroactively on collateral review, all of the principles advanced by the *Teague* doctrine are disrupted, including the criminal justice interests in finality, comity, and predictability, and the validation of reasonable, good-faith determinations of federal rights by state courts.[14] A central issue in applying the *Teague* doctrine, therefore, is when, and under what circumstances, these identified criminal justice interests may be subjugated to other ends.

B. The Court of Appeals Decision, If Left Undisturbed, Establishes Two New Circumstances Where Rules May Be Retroactively Applied or Announced on Collateral Review

The conviction and sentence in this case became final on May 27, 1986 when this Court denied direct review.[15] More than seven years and three months later, following remand from this Court, the Court of Appeals applied a new standard: "When a state asserts a penological interest (here, future dangerousness) in conduct which it cannot punish directly, we must scrutinize its actions to ensure that they have an 'appropriate relation to the safety of the state.' " *Beam*, 3 F.3d at 1309 (quoting *Herndon v. Lowry*, *supra*, 301 U.S. at 258). The Court of Appeals ruled that before the death penalty could be used to advance the future dangerousness objective, "the state must, at the least, introduce evidence demonstrating

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and the finality and comity concerns at stake. *See, e.g., Sawyer*, 497 U.S. at 242.

[14] *See Butler*, 494 U.S. at 414; *see also Sawyer*, 497 U.S. at 234; *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Teague*, 489 U.S. at 310 (plurality opinion).

[15] *See Beam v. Idaho*, 476 U.S. 1153 (1986); *see generally Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (discussing conclusion of direct review process).

a close link between that history and the defendant's future dangerousness." *Id.* The Eighth Amendment was violated, the court concluded, because there was no evidence to establish this connection. *Id.* at 1309-10.

For three independent reasons, the Court of Appeals held the application of this ruling – based upon *Herndon v. Lowry* – was not barred by the *Teague* doctrine, and could therefore be retroactively announced and applied on collateral review. Each reason establishes new precedent for avoiding the *Teague* doctrine and will be discussed in turn. Certiorari review is warranted to ensure that criminal justice interests in finality, predictability, and comity are not undercut by this lower court precedent.

1. Retroactive Application of "New Rules," Under the *Teague* Doctrine, Does Not Turn on Whether the Rule is Characterized As Substantive or Procedural

Relying upon other Ninth Circuit case law, the Court of Appeals noted "the issue before us involves the substance of the criminal law, not a rule of criminal procedure." *Beam*, 3 F.3d at 1310 (citing *United States v. Sood*, 969 F.2d 774, 775 (9th Cir. 1992)). Under this precedent, if the rule can be cast as one involving substantive criminal law, instead of procedural criminal law, all such new rules may be retroactively applied. This aspect of the case establishes a new exception to the *Teague* doctrine.

The *Teague* doctrine is clear in its command: *All* new rules are barred from being announced or applied on collateral review, absent two narrow exceptions. The retroactive applicability of the rule has *never* been contingent on the character of the rule in issue. The question is simply whether the rule is "new" (*i.e.*, is not dictated by prior precedent or breaks new ground or imposes a new

obligation on the States).[16] Moreover, under the *Teague* doctrine, this Court has considered cases involving issues of substantive Eighth Amendment law. *See, e.g., Saffle v. Parks*, 494 U.S. 484 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989). Contrary to the two narrow exceptions to the *Teague* doctrine, *see* note 13, *supra*, under the Court of Appeals decision, the finality, predictability, and comity interests advanced by the *Teague* doctrine will be cast aside if the new rules can simply be characterized as "substantive" criminal law.

2. The Novel Application of An Old Rule Yielded A Result So Novel It Forged a New Rule, and Its Application in this Case Modified Standards Established By This Court

As a separate basis for avoiding the *Teague* doctrine, the Court of Appeals concluded the *Herndon* rule was merely being applied to a different set of facts, and therefore did not constitute a "new rule." *Beam*, 3 F.3d at 1310. This aspect of the ruling also undercuts the *Teague* doctrine as it constitutes an old rule applied in a novel setting.

This Court has noted under the *Teague* doctrine that it is sometimes "necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 377. The concerns underlying the *Teague* doctrine in the

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[16] *See Teague*, 489 U.S. at 301 (plurality opinion); *see also Caspari*, 62 U.S.L.W. at 4115 (noting "the court must surve[y] the legal landscape as it then existed, and determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution") (internal quotation marks and citations omitted); *Butler*, 494 U.S. at 415 (noting new rules are "susceptible to debate among reasonable minds").

"new rule" context are equally as important during the application of an old rule in a novel setting. Under either scenario, the finality, predictability, and comity concerns advanced by the *Teague* doctrine are displaced by the retroactive application of the rule on collateral review.[17]

Here, the specific application of *Herndon*, a First Amendment case, in the Eighth Amendment context on collateral review, "yield[ed] a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. ___, 112 S.Ct. 2482, 2499, 120 L.Ed.2d 225, 250 (1992) (Kennedy, J., concurring). *Herndon* involved a statute imposing criminal liability for advocating particular political beliefs which was found unconstitutional because the statute was so vague it impinged upon First Amendment free speech rights.

The novel application of *Herndon* by the Court of Appeals breaks new ground in death penalty jurisprudence by establishing a new standard that must be satisfied concerning aggravating circumstances. Under this new rule, federal courts may review the penological interests advanced by state death penalty schemes "to ensure that they have an 'appropriate relation to the safety of the state.' " *Beam*, 3 F.3d at 1309 (quoting *Herndon*, 301 U.S. at 258). Following this precedent, as applied here, a federal habeas court may review whether an adequate evidentiary basis has been established in a particular case to support a *factual predicate* for an aggravating circumstance finding. Thus the federal court may consider the evidentiary sufficiency for *each* identified *factor* supporting a state court finding of fact on habeas review. *See Beam*, 3 F.3d at 1309 (holding "specifically, the

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[17] *See Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 377 ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent.").

state must, at the least, introduce evidence demonstrating a close link between that history [in question] and the defendant's future dangerousness").

The new rule therefore imposes a new obligation on states to introduce such evidence in capital cases. In the matter at bar, the Court of Appeals opinion concluded the Eighth Amendment was violated because no such evidence was introduced. *See Beam*, 3 F.3d at 1309. However, if the State had known that *Herndon* was applicable and imposed this obligation, it could have tried to offer evidence consistent with the new standard. That no court, state or federal, has ever extended *Herndon* in the manner proposed by the Court of Appeals demonstrates how dramatic its departure was from established law.

More significantly, this new rule departs from recent precedent of this Court on at least two grounds. *First*, this Court's "cases emphasize that the sentencing authority has always been free to consider a wide range of relevant material." *Dawson v. Delaware*, 503 U.S. ___, 112 S.Ct. 1093, 117 L.Ed.2d 309, 316 (1992) (citation and internal quotation marks omitted). *Second*, this Court has held that "[b]ecause federal habeas corpus relief does not lie for errors of state law, federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis*, 497 U.S. at 780 (citations omitted). Instead of merely applying an old rule, the Court of Appeals fashioned a new rule, one not dictated by precedent.

III. The Court of Appeals Opinion Also Expands the Scope of the First *Teague* Exception and Conflicts with Other Lower Federal Courts Decisions Concerning the Application of this Narrow Exception

Finally, assuming, *arguendo*, the application of *Herndon* constituted a new rule under the *Teague* doctrine,

the Court of Appeals held the first *Teague* exception was satisfied. *Beam*, 3 F.3d at 1310. This exception "applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense."[18]

The Court of Appeals misapplied the first *Teague* exception in holding that its ruling satisfied both parts of this limited *Teague* exception. Initially, the Court of Appeals concluded its "holding clearly forbids . . . criminal punishment of non-violent, consensual, or involuntary past sexual acts," which "is precisely the kind of 'private individual conduct' that is beyond the power of the state to proscribe through the death penalty." *Beam*, 3 F.3d at 1310-11 (citation omitted). Additionally, the court held its ruling fell within the second part of the *Penry* exception because it "simply prohibits 'a certain category of punishment,' i.e., the death penalty, 'for a class of defendants because of their status or offense,' i.e., where the penalty is based in part of the type of sexual practices we have described." *Id.* at 1311 (citation omitted).

There are two primary problems with this holding based on the record of the case before the Court. *First*, as already noted, the state trial court never actually held that the death penalty was imposed in light of respondent's non-violent, consensual, or involuntary past sexual acts. The application of the first *Teague* exception therefore does not fit the facts of this case as established by the state trial court.

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[18] *Sawyer*, 497 U.S. at 241 (citations omitted); *see also Saffle*, 494 U.S. at 494; *Penry*, 492 U.S. at 329, 330. The second *Teague* exception – which is not applicable to this case – permits the application and announcement of new rules on collateral review which involve " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495.

Second, the Court of Appeals ruling undercuts the *Teague* doctrine by expanding the availability of the first *Teague* exception. *See* note 13, *supra*. As applied, the sexual history of a defendant may not be considered by a state sentencer in a first degree murder and rape case in determining whether capital punishment is warranted. Unless overturned, this precedent may be subsequently utilized to permit the retroactive application of new rules that fit within the broad terms of the Court of Appeals opinion. In other words, the proverbial exception may swallow the general *Teague* rule precluding retroactive application of new rules on collateral review.

Finally, this recent ruling adds to the existing conflict among the circuits over the availability of the first *Teague* exception. Two other circuits, for example, have construed the first *Teague* exception broadly to permit the retroactive application of new rules deemed to be "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed."[19] At least one circuit has expressly rejected this broad construction.[20] Other lower court decisions have similarly differed

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[19] *Johnson v. Howard*, 963 F.2d 342, 345 (11th Cir. 1992) (quoting *Penry*, 492 U.S. at 329); *see also McIntyre v. Trickey*, 975 F.2d 437, 439 & n.2 (8th Cir. 1992) (citing *McIntyre v. Trickey*, 938 F.2d 899, 903-04 (8th Cir. 1991), *vacated and remanded for reconsideration on other grounds sub nom., Caspari v. McIntyre*, 112 S.Ct. 1658, 118 L.Ed.2d 381 (1992)).

This construction calls into question the scope of the first *Teague* exception. Instead of a "narrow" exception to the *Teague* doctrine, *see* note 13, *supra*, it is not clear what limits there are in these circuits to the retroactive application of new rules, as long as the rule may be characterized as a "substantive categorical guarantee[ ]."

[20] *See United States v. Salerno*, 964 F.2d 172, 178 (2d Cir. 1992) ("It seems to us that *Penry* effects a rather carefully limited

on the contours of the exception.[21] In addition to the reasons already noted, review of the instant case would also provide an opportunity for this Court to clarify the scope and availability of the first *Teague* exception.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

Dated: April 4, 1994

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expansion of the first 'primary conduct' exception [to the first *Teague* exception], and that *McIntyre* inappropriately puts *Grady* [*v. Corbin*, 495 U.S. 508 (1990)] into the *Penry* category.").

[21] *See Clark v. Dugger*, 901 F.2d 908, 912 (11th Cir.) (noting the first exception "concerns a shifted boundary of criminal conduct"), *cert. denied*, 498 U.S. 951 (1990).

APPENDIX

Statutory Presumption of Correctness to State Court Findings of Fact on Federal Habeas Review

28 U.S.C. § 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

* * *